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THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE QUESTION OF TRANSNATIONAL CORPORATIONS

Working document on the impact of the activities of transnational corporations on the realization of economic, social and cultural rights, prepared by Mr. El Hadji Guissé, pursuant to Sub-Commission resolution 1997/11

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Introduction

1. Today's economic and financial systems are organized in such a way as to act as pumps that suck up the output of the labour of the toiling masses and transfer it, in the form of wealth and power, to a privileged minority. A number of mechanisms assist in this operation: wage freezes or cuts, job insecurity, unemployment, policies that penalize the poor, ill-considered privatization of key sectors such as water supply and energy, etc. With few exceptions, this is the general rule.

2. Any discussion of the impact of the activities of transnational corporations presupposes a definition of "transnational corporation". A number of criteria can be found by examining the various definitions used in the literature and in the debates taking place within international organizations. These criteria include conducting activities in several countries, the pooling of resources, and the joint preparation and application of a coordinated strategy.

3. In legal terms these corporations are economic entities with activities in several countries. As a result, they are a cause of legal and jurisdictional conflict and thus give rise to quite serious problems in the realization of individual and collective economic rights. It is important to note that the size of the company is unimportant and that small and medium-sized enterprises are just as active as large corporations.

4. No definition of "transnational corporation" could be found anywhere in the literature on international law; the concept is dealt with only in the United Nations Conference on Trade and Development (UNCTAD) set of principles and rules, which defines them as firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combination thereof, irrespective of the mode of creation or control or ownership, private or State, which are engaged in commercial activities. This definition is used in order to exclude criteria such as the legal form of the company, the provenance of the capital or the identity of the management.

5. The characteristics of transnational corporations can be derived, on the basis of other, more pragmatic, considerations, from an examination of de jure and de facto criteria:

- de facto: when a company known as the parent company owns a share of another company and effectively exercises a dominating influence over it, or the subsidiary is under its control;

- de jure: when the parent company holds a majority of the voting rights of a subsidiary's shareholders, it has the right to annul the majority of the members of the administrative body and holds a majority of votes.

6. This natural contradiction between the interests at stake is at the heart of the debate on the impact of the activities of transnational corporations on the promotion and protection of human rights.

7. Transnational corporations play an important part in international economic life. Of the 100 biggest concentrations of wealth in the world, 51 per cent are owned by transnational corporations and 49 per cent by States. Mitsubishi's turnover exceeds Indonesia's gross national product (GNP); Ford's turnover exceeds South Africa's GNP; and Royal Dutch Shell earns more than Norway. Transnational corporations are very active in the most dynamic areas of the economy, in particular telecommunications, transport, banking, insurance and the wholesale trade. They have a presence in the vital sectors and are thus in a position to block any moves towards the respect for and protection of human rights.

8. The globalization of the economy may lead to the creation of even more wealthy transnational corporations but also even greater numbers of poor people, particularly in countries whose economy is weak. It will be necessary to consider how we are going to manage the development and proliferation of transnational corporations to the benefit of all. They can and must participate, while abiding by the rules, in the economic development of the States where they are located and in whose economies they operate.

9. Since the expansion of transnational corporations has become the rule, international law needs constant adaptation in order to deal with the problems arising from their operation. As in the past, the concerns relate to the accumulation of wealth by a group of individuals at the expense of the majority, thereby creating ever poorer masses. The ability of these corporations to operate within a wider area and to cross national frontiers, thus evading national and international law, exacerbates and complicates the problems they present.

Issues of international law

10. The adaptation of the international legal order to the economic realities created by transnational corporations requires the harmonization of national and international legal texts containing a range of provisions dealing with various kinds of problem, including the protection and promotion of human rights. General law has addressed the activities of transnational corporations, but it is above all private law that has devoted most space to them.

11. The United Nations General Assembly, in its resolution 3514 (XXX) of 15 December 1975, condemned all corrupt practices, including bribery, by transnational and other corporations, and reaffirmed the right of any State to adopt legislation and to investigate and take appropriate legal action. It should also be recalled that the General Assembly and the Economic and Social Council have carried out further work on the issue of illicit payments and on drawing up a code of conduct on transnational corporations, consideration of which helped call attention to corrupt practices in international commercial transactions and to raise awareness of their adverse consequences for the economic life of States and, consequently, for the implementation of economic, social and cultural rights of human individuals and groups.

12. The United Nations Declaration against Corruption and Bribery in International Commercial Transactions encourages the parties to international transactions to exercise social responsibility and adhere to appropriate

standards of ethics, inter alia, through observance of the laws and regulations of the countries in which they conduct business, and taking into account the impact of their activities on economic and social development and protection of the environment and of human rights.

13. Transnational corporations are of course organizations whose raison d'être is to make a profit. However, in the pursuit of this aim it is possible for them to leave room for the protection and promotion of individual human rights. In the past, some of them have had to include in agreements with indigenous populations a commitment to respect collective or individual rights, even though this commitment may not have been observed in practice.

14. In legal terms, transnational corporations are economic entities with activities in several countries and the first problem they present relates to the legal and jurisdictional conflicts they give rise to, which have a legal bearing on the implementation of economic rights.

15. With the Naples Political Declaration and Global Action Plan against Organized Transnational Crime, adopted on 23 November 1994 by the World Ministerial Conference on Organized Transnational Crime, 140 States committed themselves to joining forces to combat the expansion of organized crime. One of the questions the Conference addressed was the definition of a transnational crime. The participants referred that question to the Commission on Crime Prevention and Criminal Justice in order to obtain expert opinions. The States participating in the Conference resolved to protect their societies from crime in all its forms through strict and effective legislative measures and international instruments, always consistent with human rights and fundamental freedoms.

16. The negative impact of the activities of transnational corporations on human rights could constitute an aspect of such international crime merely as a result of their presence in several societies. Since their aim is to make a profit, such companies are unaware of or disregard the impact their activities could have on economic, social and cultural rights, whether at the collective level or at an individual level. These companies are frequently, if not always, behind massive human rights violations; in the same spirit, the States that benefit from their activities pass legislation in their favour, protecting them to the detriment of the people and their rights. Moreover, certain transnational corporations encourage States to violate their people's rights. Transnational oil corporations have in recent years frequently been accused of sparking bloody conflicts throughout the world: in the Congo, in the Democratic Republic of the Congo (formerly Zaire), in Nigeria, in Iraq, etc.

Incorporation of the realization of economic, social and cultural rights in agreements between transnational corporations and States

17. Transnational corporations, in the headquarters agreements they sign with States, should commit themselves, as part of a progressive policy, to taking responsibility for the realization of collective or individual economic rights. With regard to collective rights, that is to say the right to development and the right to a healthy environment, transnational

corporations, in cooperation with the international organizations of the United Nations system, regional organizations and States, should develop a framework for consensus-building on the full range of problems presented by development and the environment. These two concepts form the context for the exercise or enjoyment of human rights in general and of economic, social and cultural rights in particular.

18. The economic and social development of a country requires the participation of all its active members. Individuals should come first and last in action for development, that is to say, they should benefit from it as well as participating in it. The action for development undertaken by transnational corporations should incorporate the promotion and protection of the economic, social and cultural rights of individuals and of States.

19. According to article 30 of the Universal Declaration of Human Rights, "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

20. Article 3, paragraph 3, of the Declaration on the Right to Development defines development as a global process that should "promote a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all States, as well as ... encourage the observance and realization of human rights". This reminder of the provisions on development calls on transnational corporations as well as individuals to respect and protect human rights.

21. It is impossible to incorporate respect for the values on which our existence is based into the current practices that aim to maximize profit regardless of other considerations. The same applies to the right to a healthy environment. Life is threatened by pollution in every area: air, water and land. The proliferation and development of polluting domestic or international companies are destroying the environment in which we live.

22. The unrestrained exploitation of African and Latin American forests has accelerated the progress of desertification and the impoverishment of arable land. Such practices are undoubtedly a violation of the economic rights of the populations concerned. Moreover, the exploitation is not followed by reforestation.

23. According to the Secretary-General of the United Nations Conference on Environment and Development, the conservation of biological diversity is fundamental to human life. It is an essential factor in the way living organisms are structured. It contributes to ecosystems and the stability of water and the atmosphere, and is the basis of agricultural production. As a result, when genetic varieties are lost, ecosystems deteriorate and the ability to support human life diminishes.

Conclusions and recommendations

24. With regard to domestic law, all mechanisms and practices leading to violations of economic, social and cultural rights should be made punishable offences with the right of compensation. The Committee on Economic, Social

and Cultural Rights, in its General Comment No. 3 (1990), discussed the nature of States parties' obligations as derived from article 2, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights and stated, inter alia, that the adoption of legislative measures is by no means exhaustive of the obligations of States parties, for the phrase "by all appropriate means" must be given its full and natural meaning, which is to say that the provision of judicial remedies in support of those rights should be included in those measures; it also means that States should be careful not to take any deliberately retrogressive measures. In that context, States should draw up a range of legislative measures criminalizing all activities by transnational corporations which violate the above-mentioned rights.

25. At the international level, it is worth recalling a now classic suggestion, namely the establishment of a more binding and coherent legal framework to make States accept their commitments under international law, which now includes the notion of State liability. This point was underscored by the Brussels Convention on the Liability of Operators of Nuclear Ships, of 25 May 1962, the International Covenant on Civil Liability for Oil Pollution Damage, of 29 November 1969, and the Convention on International Liability for Damage Caused by Space Objects, of 29 November 1971.

26. The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana from 27 August to 7 September 1990, adopted some recommendations on international cooperation in crime prevention and criminal justice in the context of development. The Congress recommendations urged Governments to promulgate laws to combat transnational crime and illegal international transactions. They state that, since even legitimate enterprises, organizations and associations may sometimes be involved in transnational criminal activities affecting national economies, Governments should adopt measures for the control of such activities. They also recommend that Governments should collect information from various sources so as to have a solid base for the detection and punishment of enterprises and organizations or their officials, or both, if they are involved in such activities.

27. In terms of polluting transnational corporations in particular, in addition to special regulations, taxes should be levied on their turnover so that they contribute to efforts to treat industrial waste. They should also be systematically held accountable for damage caused to populations and States.

28. In view of the complexity of the problems surrounding the activities of transnational corporations and the realization of economic and social rights, it would be appropriate to examine all these questions in a broader framework and to present them to the Sub-Commission at future sessions.